Supreme Court, U. S.
FILED
JAN 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-951

* * *

OSCAR S. SAVAGE, W. J. ESTELLE, JR., AND BILLY G. McMILLAN

Petitioners

V.

ENRIQUE CARRERA LERMA,

Respondent

* * *

Petition For Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

* * *

PETITION FOR CERTIORARI

* * *

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SUBJECT INDEX

PAGE

SUBJECT INDEX i

INDEX OF AUTHORITIES ii

OPINION BELOW 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

REASONS FOR GRANTING THE WRIT 3

I. The Decision Of The Fifth Circuit Court Of Appeals Conflicts With The Decision Of The Court Regarding Inmate Transfers 3

II. The Decision Of The Fifth Circuit Sets Out An Unworkable Rule For Prison Administrators And The Federal Courts 3

CONCLUSION 8

PROOF OF SERVICE 9

INDEX OF AUTHORITIES

CASES	PAGE
Haymes V. Montanye, 547 F.2d 188 (2nd Cir. 1976)	6
Jones V. North Carolina Prisoners' Labor Union Inc., _____ U.S. ___, 97 S.Ct. 2532 (1977)	7,8
Meachum V. Fano, 427 U.S. 215 (1976)	3,4,6,7
Montanye V. Haymes, 427 U.S. 236 (1976)	3,4,5,6
Pell V. Procunier, 417 U.S. 817 (1974)	7
Rizzo V. Goode, 423 U.S. 362 (1976)	8
Russell V. Oliver, 552 F.2d 115 (4th Cir. 1977)	6
Wolff V. McDonnell, 418 U.S. 539, 577 (1976)	7

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PETITION FOR CERTIORARI

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioners, Oscar S. Savage, W. J. Estelle, Jr., and Billy G. McMillan, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 25, 1977.

OPINION BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit appears as Appendix A hereto.

The Order of Dismissal entered in the Southern District of Texas, Houston Division, appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 25, 1977. A timely petition for rehearing *en banc* was denied on October 6, 1977, and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether Respondent's complaint that he was transferred from one prison unit of the Texas Department of Corrections to another in retaliation for his legal activities was properly dismissed for failure to state a claim under 42 U.S.C. §1983.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 48:

§1983. *Civil action for deprivation of rights*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

REASONS FOR GRANTING THE WRIT

The Court of Appeals held that Plaintiff's allegations that he was transferred in retribution for testifying before a Legislative committee and for his legal activities on behalf of himself and other inmates may implicate first amendment rights and rights of access to the courts. The Court of Appeals ruled that these issues are not clearly foreclosed by this Court's opinions in *Meachum v. Fano*, 427 U.S. 215 (1976) and *Montanye v. Haymes*, 427 U.S. 236 (1976). Defendants urge that this ruling is unsupportable under the facts of the *Meachum* and *Montanye* cases, universally intrudes in the domain of prison officials' discretion, and exposes the federal courts to a possibility of vast numbers of frivolous prisoner cases.

I. The Decision Of The Fifth Circuit Court Of Appeals Conflicts With The Decisions Of This Court Regarding Inmate Transfer.

Plaintiff's only complaint in this case was that he was transferred without advance notice or an opportunity to request a hearing. Although plaintiff alleged that the reason for the transfer was retaliation for his legal activities, he in no way alleged or implied that he was being denied access to the courts as a result of the transfer. He has not alleged or implied that as a result of the transfer he was not allowed legal materials, resources, mailing privileges, access to legal assistance, or any other resource which unconstitutionally restricted his legal activities. Nor has he alleged or implied that any constitutionally protected first amendment rights as a state prisoner have been impermissibly burdened. Plaintiff's only complaint is that because he has pursued legal remedies, he was transferred; no situation or condition other than the transfer itself is challenged. Furthermore, the transfer

is challenged only in that it was effected without notice or opportunity for hearing.

In the companion cases of *Meachum* and *Montanye*, this Court made it clear that the due process clause alone does not entitle an inmate to a hearing when he is transferred from one prison within a state prison system to another, even one with substantially more burdensome conditions. Absent a state law or policy conditioning such transfers on proof of serious misconduct or the occurrence of other specified events, the decision to transfer an inmate is a matter of administrative discretion.

Texas does not confer upon state prisoners a right or expectation that they will be transfered from one unit of the Texas Department of Corrections to another only for misbehavior or other specified events. As the Court of Appeals correctly observed:

> Texas prison officials have wide discretion for placement of inmates. Convicted felons in Texas are sentenced to terms of confinement at the Department of Corrections, not to specific institutions within the prison system. Tex. Penal Code §§ 12.31 - .34. Moreover, the director of the Department has the statutory authority to provide for the separation and classification of prisoners according to such factors as sex, age, health and corigibility. Tex.Civ.Stat.Ann. art. 6166j.

Per Curiam Opinion, at 1-2.

Thus, because Texas prison officials have wide discretion in the placement of inmates within the Department of Corrections, no constitutionally protected right of plaintiff is affected even assuming *arguendo* that his allegation that he was transferred in

retaliation for his legal activities is true. Defendants recognize that if the conditions in the prison to which Plaintiff was transfered were alleged to be so harsh as to constitute cruel and unusual punishment, he would state a cause of action under §1983. Similarly, if Plaintiff had alleged that his transfer resulted in an unconstitutional denial of access to the courts, there would be a basis for suit. However, since Plaintiff has neither raised nor suggested such allegations, he has failed to state a claim of constitutional dimension. Plaintiff may not elevate his complaint concerning the circumstances surrounding his transfer to constitutional dimensions by the mere incorporation of the allegation of "retaliation."

Indeed, this Court's opinion in *Montanye* indicates that prison officials' transfer of an inmate in direct response to the inmate's legal activities does not implicate constitutional deprivations. There, Haymes was transferred following his circulation among inmates of a petition complaining that his removal from a job in the prison law library deprived inmates of needed legal assistance. Also, the Court of Appeals for the Second Circuit noted that as a result of Haymes' transfer, contacts with counsel would necessarily have been more difficult, and he would have suffered several other adverse consequences of the "punitive" as opposed to "administrative" transfer. *Montanye, supra* at 240. Even though Montanye's first amendment rights and right of access to the courts were directly implicated, this Court firmly held that:

> . . . no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not

> be transferred except for misbehavior or upon the occurrence of other specified events.

Id., at 242.

This Court then reversed the Appeals Court's judgment which had, in turn, reversed the district court's dismissal of the action.[1] The relationship between Haymes' legal activities and his transfer was not considered by this Court to be a circumstance requiring a hearing.

Defendants urge that the opinion below incorrectly limits the reasoning of this Court in the *Meachum* and *Montanye* cases. *Meachum* and *Montanye* indicate that no due process liberty interest of a state prisoner is affected by his transfer among prisons absent some right or expectation rooted in state law.

[1]Petitioner challenges the subsequent ruling of the Second Circuit in *Haymes v. Montanye*, 547 F.2d 188 (2nd Cir. 1976), in which that court reversed the district court's dismissal and remanded for a hearing on the reasons for and circumstances of the transfer. That court, like the Appeals Court in the instant case, held that an inmate's claim that a transfer in reprisal for exercising first amendment rights and right of access to the courts states a claim which cannot be dismissed on the pleadings. Petitioners contend that this holding, based upon this Court's dissenting opinion in *Montanye*, is unsupportable in light of the majority opinion that:

> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.

Meachum, supra at 228. Because New York officials did not seek review of the Second Circuit's opinion on remand from this Court, the instant case presents the first opportunity for the Court to correct misinterpretations of the *Meachum* and *Montanye* opinions. *See also Russell v. Oliver*, 552 F.2d 115 (4th Cir. 1977).

Texas law affords no such right or expectation, so prison officials have the discretion to transfer prisoners for whatever reason or no reason at all without invoking the procedural safeguards of the fourteenth amendment.

II. The Decision Of The Fifth Circuit Sets Out An Unworkable Rule For Prison Administrators And The Federal Courts.

To allow judicial review of the reasons for transfer of inmates where there is no allegation that the transfer has resulted in injury of constitutional dimension to the inmate's interests would involve the federal judiciary in the day-to-day functioning of the state prisons to an unwarranted degree. *Meachum, supra*, at 229; *Jones v. North Carolina Prisoners' Labor Union, Inc.*, ___ U.S. ___, 97 S.Ct. 2532 (1977); *Pell v. Procunier*, 417 U.S. 817 (1974). Prison administrators are the individuals best qualified through experience and education to make the difficult decisions regarding institutional placements. For this reason, "wide-ranging deference [must] be accorded the decisions of prison administrators." *Jones, supra*, at 2538; *Pell v. Procunier, supra*. Judicial review of the reasons behind each transfer decision is inconsistent with the policy of according "wide deference" to the decisions of prison officials.

Furthermore, by providing that there are some reasons for transfer that are impermissible, regardless of whether the transfer is alleged to have resulted in a burden on an inmate's constitutionally protected rights, the Court of Appeals' decision opens all prison transfer decisions to attack in the federal courts. An inmate, by the simple expediency of alleging that he was transferred in retaliation for certain protected activities, can force prison officials to undertake the expensive and time-consuming task of justifying to a federal court a decision to transfer the inmate. *Cf. Wolff*

v. McDonnell, 418 U.S. 539, 577 (1976). In Texas in 1976 alone, there were 5,346 transfers of inmates among units of the Department of Corrections after initial assignment to a unit. The Court of Appeals' ruling thus raises the possibility of over five thousand additional inmate civil rights cases, all requiring evidentiary hearings. This possibility places an unjustifiable burden on the prison administration and is an unwarranted interference in matters of state government. *Jones, supra; Rizzo v. Goode*, 423 U.S. 362 (1976). In addition, the potential increase in litigation would cripple the already overburdened federal courts with a mass of meritless prisoner cases.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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PROOF OF SERVICE

I, DAVID M. KENDALL, First Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, now enter my appearance in this cause on behalf of the Petitioners, and do hereby certify that three copies of the foregoing Petition for Certiorari have been served by placing same in the United States mail, first class, postage prepaid, certified, return receipt requested, on this the ___ day of _____, 1977, addressed to: Enrique Carrera Lerma, Ellis Unit, Route 3, Huntsville, Texas 77340.

DAVID M. KENDALL
First Assistant Attorney General

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1639
Summary Calendar*

ENRIQUE CARRERA LERMA,
Plaintiff-Appellant,

versus

OSCAR S. SAVAGE, ET AL.
Defendants-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(August 25, 1977)

Before THORNBERRY, RONEY, and HILL, Circuit Judges.

PER CURIAM:

Appellant Lerma, a prisoner in the Texas Department of Corrections, brought this *pro se* action under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). He alleges that he was summarily transferred, without notice or hearing, from a medium security prison to the Department's only maximum security unit as

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casulty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

punishment for testifying before a committee of the Texas Legislature regarding prison brutality and for filing and assisting other prisoners in filing actions in federal court complaining of prison conditions and acts of prison officials at the medium security facility.

The district court dismissed the action for failure to state a claim on which relief can be granted, relying on *Meachum v. Fano*, 427 U.S. 215 (1976), and *Montanye v. Haymes*, 427 U.S. 236 (1976). In these companion cases the Court made clear that the due process clause of the Fourteenth Amendment does not entitle a prisoner to a hearing when he is transferred to a prison with substantially less favorable conditions, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other specified events. The Court rejected an argument that such a transfer infringed or implicated a liberty interest of the prisoners within the meaning of the due process clause and was unwilling to require a hearing even though the transfer would place the prisoner in more burdensome conditions than he had been experiencing. Finally, the Court stated that in these cases, arising in Massachusetts and New York, a prisoner had no right or expectation of remaining at a particular institution since prison officials have discretion to transfer prisoners for any reason or no reason at all.

Texas prison officials have wide discretion for placement of inmates. Convicted felons in Texas are sentenced to terms of confinement at the Department of Corrections, not to specific institutions within the prison system. Tex. Penal Code §§ 12.31-.34. Moreover, the director of the Department has the statutory authority to provide for the separation and classification of prisoners according to such factors as sex, age, health and corrigibility. Tex. Civ. Stat. Ann. art. 6166j.

However, in his *pro se* complaint in the district court, appellant asserted that he was transferred in retribution for testifying before a Legislative committee and for his legal activities on behalf of himself and other inmates. Neither appellee's brief to this Court nor the district court's order of dismissal address these allegations, which raise issues not clearly foreclosed by *Meachum* and *Montanye*. For example, the transfer in the instant case may implicate First Amendment rights, *see Montanye v. Hayes*, 427 U.S. 236, ___, 96 S. Ct. 2543, 2548 (Stevens, J., Dissenting), as well as the rights of prisoners to serve as "jailhouse lawyers" and to have access to the federal courts. *See Wolff v. McDonnell*, 418 U.S. 539 (1974); *Andrade v. Hauck*, 542 F.2d 1071 (5th Cir. 1971); *Corpus v. Estelle*, 551 F.2d 68 (5th Cir. 1977).

We intimate no views on the merits, but rather remand this cause to the district court for a full ventilation of the facts and consideration of these issues. Because appellant has brought this action *in forma pauperis*, the district court may also consider whether counsel should be appointed in the subsequent proceedings.

VACATED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Enrigue Carrera Lerma, Plaintiff,	(	
V.	(	Civil Action No. 76-H-784
Oscar S. Savage, et al., Defendants	(	

ORDER OF DISMISSAL

The plaintiff is an inmate of the Texas Department of Corrections. He has filed this action pro se under 42 U.S.C. § 1983 complaining of his transfer from the Retrieve Unit of the Texas Department of Corrections, a medium security facility, to the Ellis Unit, a maximum security facility, without a hearing. It is now clear that the due process clause of the fourteenth amendment does not protect an inmate who is transferred without a hearing to another unit of the prison system whose conditions are less favorable. *Meachum v. Fano*, ___ U.S. ___, 49 L. Ed. 2d 451 (1976); *Montange v. Haymes*, ___ U.S. ___, 49 L. Ed. 2d 466 (1976). Furthermore, under state law transfers are at the statutory discretion of the Director, V.A.T.S. art. 6166j, and at sentencing, confinement is ordered with the Department of Corrections, not within any specific unit. Texas Penal Code § 12.31-12.34.

Accordingly, it is ORDERED, ADJUDGED AND DECREED that the above-styled-and-numbered cause be, and the same is hereby, DISMISSED for failure to state a claim upon which relief may be granted.

DONE at Houston, Texas, on the *1st* day of *February*, 1977.

[John V. Singleton]

United States District Judge